IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8913 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SHANITBHAI AMBALAL PATEL

Versus

DHOLKA NAGARPALIKA

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Appearance:

1. Special Civil Application No. 8913 of 1999
MR MB GANDHI for Petitioner No. 1
MS TRUSHA M GANDHI for Petitioner No. 1
MR PARESH UPADHYAY for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 14/10/2003

ORAL JUDGEMENT

Heard learned advocate Mr. M.B.Gandhi for petitioner and learned advocate Mr.Paresh Upadhyay appearing on behalf of respondent.

2. The brief facts of the present petition are as under.

2.1 On 1.2.1984 the petitioner was directly recruited as Head Clerk with the respondent. From 17.6.1998 to 8.2.1999, the petitioner was in charge of the post of Chief Officer. On 8.2.1999, Mr. D.B.Mehta was appointed as the Administrator of Dholka Nagar Palika. On 6.4.1999, the petitioner was suspended by the respondent-Administrator and on 27.5.1999, a chargesheet was given to the petitioner on various allegations. According to the petitioner, as no documents referred to in the chargesheet were given to the petitioner, he wrote a letter to the respondent calling certain documents by letter dated 1.6.1999. Even in inquiry proceedings also, he was not permitted to engage an Advocate. Thereafter on 9.6.1999, reply to the application dated 1.6.1999 was given by the respondent and necessary documents were furnished to the petitioner as per the chargesheet. On 17.6.1999, petitioner submitted the written statement to the chargesheet. On 24.6.1999, the Administrator wrote a letter that written statement of the petitioner is not acceptable and the order dated 1.7.1999 for payment of suspension allowance was passed and on 8.10.1999, inquiry officer has submitted the report to the petitioner to which the petitioner gave reply on 15.10.1999. The order of dismissal has been passed by the Administrator. Page 28 (Annexure-A) is the suspension order passed by the Administrator against the petitioner and page 31 is the chargesheet dated 27.5.1999. The chargesheet is issued by the Administrator of respondent Nagarpalika. A letter was written by the petitioner demanding certain documents which were supplied to the petitioner on 9.6.1999. Page 50 is the statement of recovery of Nagarpalika tax and page 51 is also for the same for different period about the tax amount. Page 52 is also the statement of amount of tax recovered during the subsequent period. Page 65 to 84 is a reply submitted by the petitioner against the chargesheet. Page 85 is the reply which was given by the petitioner but was not accepted by the Administrator of respondent Nagarpalika.

3. It is necessary to note at this stage that

chargesheet though served to the petitioner was replied by him without any inquiry in respect of chargesheet. Till the date of receiving the reply from the petitioner, the Administrator of the respondent Nagarpalika has come to the conclusion that on the basis of documentary evidence the reply submitted by the petitioner is not accepted. As to on what reason or ground the reply has not been accepted is not mentioned in the said letter which is at page 85. What would be the effect of not accepting the reply prior to the stage of inquiry is a different question which is required to be considered. It may suggest the predetermined mind of the Administrator of the respondent Nagarpalika because while taking the decision not to accept the reply, no inquiry was held against the petitioner. The request to engage an Advocate has been rejected. As per page 88, an order has been passed on 1.7.1999 for the payment of suspension allowance to the petitioner. The important document is at page 90, which is an inquiry report of Mamlatdar dated 8.10.1999, who was inquiry officer. The inquiry officer has given finding in respect to each charge. It is necessary to note at this stage that no witnesses have been examined by the presenting officer on behalf of the respondent Nagarpalika before the inquiry office to prove the charge against the petitioner. The whole report of inquiry is based on documents which have been scrutinised by the inquiry officer on the basis of documents and replies which were submitted by the petitioner. Except that, there is no other discussion about any evidence wherein the relevant documents have been proved by the presenting officer against the petitioner by leading oral evidence. The method which has been adopted by the inquiry officer is that each allegation has been taken into account and against that, the inquiry officer has considered the written statement of the petitioner and then he concluded that the reply should not be accepted and as a result thereof, the charge is proved against the petitioner. The Mamlatdar, inquiry officer has given chance to the petitioner to the effect that if he wants to say orally over and above the written statement which was filed against the chargesheet and for that hearing was fixed on 28.7.1999. Then the petitioner personally remained present before the Mamlatdar inquiry officer and he reiterated the same thing that whatever the reply given by him earlier on 17.6.1999 is enough and he do not want to add anything and he also did not want to make further explanation. This was also taken into account by the inquiry officer and ultimately he come to the conclusion that charges Nos. 1 to 6, 8 and 9 are proved against the petitioner and charge No.7 is partly proved and as regards charge No.10, it was his conclusion that

the same is ambiguous and that is how it remained without being proved against the petitioner. But, after perusal of the inquiry report, it appears that no witness has been examined by the respondent Nagarpalika for proving the documents which have been relied upon by the Nagarpalika against the petitioner. Meaning thereby, the documents which were relied upon by the Nagarpalika were considered to be correct, legal and valid though no witness in support thereof by the Nagarpalika in view of the reply given by the petitioner. The said method is apparently not in accordance with the principles of natural justice. It is necessary to note one important aspect again that very reply in prior point of time to the inquiry report, has not been accepted by the Administrator of respondent Nagarpalika. I fail to understand the method and manner of departmental inquiry which has been adopted by the respondent Nagarpalika that before starting the departmental inquiry against the petitioner after the chargesheet the reply which was submitted by the petitioner on 17.6.1999 has not been accepted, meaning thereby, it was rejected by the Administrator and thereafter the departmental inquiry was initiated against the petitioner. Then what is the purpose to again testing the reply in light of the documents which are placed before the inquiry officer. On the basis of inquiry report a notice dated 11.10.1999 was served to the petitioner to show cause as to why the punishment should not be imposed, for which petitioner is required to give explanation. That explanation was given by the petitioner on 15.10.1999 which is at page 108 to 127. Meaning thereby, more than 19 pages the reply given by the petitioner was there. Thereafter on 25.10.1999 the dismissal order has been passed against the petitioner. The Administrator of respondent Nagarpalika has considered while passing the order of dismissal the reply which was submitted by the petitioner on 15.10.1999. The important aspect is the observations which have been made by the Administrator that petitioner is found to be responsible for mismanagement and negligent in working which ultimately ruined the respondent Nagarpalika and therefore the reply dated15.10.1999 is not satisfactory and rational and therefore, it is decided to punish the petitioner by imposing harsh punishment. Therefore, the decision was taken to impose an extreme and harsh penalty like an economic death because his reply was not found satisfactory and rational by the Administrator of the respondent Nagarpalika. While passing the order of punishment, the Administrator has also not considered long span of service of the petitioner of more than 15 years as also the past record of the petitioner.

4. Affidavit-in-reply has been filed by one Mr. Yogesh J Ganatra as a Chief Officer of the Dholka Nagarpalika denying the averments of the petitioner and supporting the dismissal order by making necessary averments.

5. In light of this factual background which are on record and annexed to the petition, learned advocate Mr. M.B.Gandhi has submitted that whatever the method and manner adopted by the respondent Nagarpalika in department inquiry is merely a formality but in substance it was not real inquiry in accordance with the principles of natural justice. He submitted that the mere form or formality of inquiry is not enough to satisfy the requirement of principle of natural justice but in substance the departmental inquiry must have to be held in accordance with the principle of natural justice. He relied upon the decision of the Division Bench of this Court reported in 1993 (1) GLR 442. He also suggested that the form of inquiry or mere formality which has been adopted by the respondent Nagarpalika, that may be set aside and let the Nagarpalika may denovo held proper inquiry against the petitioner and meanwhile the petitioner may remain under suspension. This suggestion has been made by him on the basis of the order passed by this Court in Special Civil Application No. 9753 of 1999 dated 23.9.2003 against very Nagarpalika and wherein almost identical situation has been examined by this Court and this Court in that petition has set aside the inquiry and dismissal order with a direction to hold denovo inquiry properly in accordance with the principles of natural justice and meanwhile that petitioner was remained under suspension.

6. Learned advocate Mr. Paresh Upadhyay appearing on behalf of the respondent Nagarpalika relied upon the averments made in the affidavit-in-reply. He first raised the contention before this Court that alternative effective statutory remedy is available to the petitioner by way of appeal against the dismissal, to the Director of Municipalities which has not been availed and straightway this petition has been filed by the petitioner. Therefore, this petition is not maintainable and to that specific contention has been raised by the Nagarpalika in the affidavit-in-reply. He also emphasized that the departmental inquiry, according to the Nagarpalika is properly held and there is no need to examine any witness on the side of Nagarpalika because entire case is based upon documentary evidence and for that two opportunities were given by the Nagarpalika to

the petitioner. One is to file reply against the chargesheet and the second in the departmental inquiry, a personal hearing was given by the inquiry officer on 28.7.1999 and he repeated the same thing and made clear before the inquiry officer that he does not want to add anything further over and above the reply dated 15.6.1999 submitted to the Administrator of the Dholka Nagarpalika. Therefore, learned advocate Mr. Paresh Upadhyay has submitted that the inquiry has been fairly conducted by the respondent Nagarpalika and there is no violation of principle of natural justice and there is no prescribed form of the departmental inquiry determined by any statutory provision. Therefore, ultimately the substance is that in departmental inquiry whether reasonable opportunity has been given to the petitioner or not and any prejudice has been caused to the petitioner or not. Both the criteria are fully satisfied in the inquiry which was held by the respondent Nagarpalika and there is no prejudice caused to the petitioner and reasonable opportunity was given to the petitioner. Therefore, according to him inquiry is fair, just and proper and not violative of principle of natural justice. He also emphasized that even before passing the punishment order, an opportunity was given to the petitioner to file reply or to give explanation which was given by the petitioner and considered by the respondent Nagarpalika and ultimately Administrator thought it fit that it is a fit case in which the responsibility of the petitioner is seriously fixed by the authority and ultimately the dismissal order has rightly been passed by the Disciplinary Authority. Therefore, he submitted that present petition may be dismissed with costs.

7. I have considered the submissions made by both the learned advocates. The first contention which learned advocate Mr. Paresh Upadhyay has raised is that an alternative effective remedy is available to the petitioner to appeal against the dismissal order to the Director of Municipality. It is settled principle of law that once the matter is admitted by this Court, the question of alternative remedy cannot be entertained by this Court. The view taken by the Division Bench of this Court in the case of K.S.JOY V. INDIAN INSTITUTE OF MANAGEMENT, 1994 (1) GLR 57 is reproduced as under:

> "Even if it is assumed that the provisions of Section 52(A) of the Gujarat University Act are attracted and the dispute could be referred to a Tribunal or Arbitration as provided therein then also once the petition is entertained by the High Court and is heard on merits it would not be

proper for the High Court to relegate the party to an alternative remedy. This is the view taken by the Supreme Court in the case of Hridya Narayan v. Income Tax Officer reported in AIR 1971 SC 33."

8. Moreover, it may be noted that availability of an alternative adequate remedy and exhausting of the same before resorting to the petition include Article 226 of the Constitution of India does not oust the jurisdiction of the Court. In the case of RAM AND SHYAM COMPANY V. STATE OF HARYANA AND OTHERS, AIR 1985 SC 1147, the Supreme Court has inter alia observed that the Courts have imposed a restrain in its own wisdom of exercise of jurisdiction under Article 226 of the Constitution of India, wherein the authority invoking the jurisdiction as an effective adequate alternative remedy. More often it has been expressly stated that rule which requires exhaustion of alternative remedy is a rule of convenience and discretion rather than rule of law. Had any read it does not oust the jurisdiction of the Court. The Supreme Court has further stated as under:

"Where the order complaint against is alleged to be illegal or invalid as being contrary to law a petition at the instance of person adversely affect by it would lye to the High Court under Article 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer of the State Government. An appeal in all cases cannot be said to be proved in all situations as an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. In the present case the petition is filed on 26.9.1988, the impugned order is dated 20.9.1988 by which the services of the petitioner have been terminated. Now, after a period of four and half years it would be unjust and unfair to the petitioner to relegate to alleged alternative remedy which in our opinion in the facts of the case cannot be said to be an adequate effective remedy. For this reason also this contention fails."

9. The similar view has been taken earlier point of time by this Court in case of MAHENDRAKUMAR VEERABHAI MAKVANA V. STATE OF GUJARAT AND ANOTHER, 1991 (1) GLH 1 relying upon the decision of Supreme Court in reported decision of Supreme Court in H.M.'s case reported in AIR 1971 SC page 33.

10. Therefore, the contention which has been raised by Mr. Paresh Upadhyay about having effective alternative remedy cannot be accepted after the period of more than four and half years from the date of filing the petition and issuing the rule by this Court otherwise it amounts to unjust and unreasonable for the petitioner to relegate him to alternative remedy of appeal to the Director of Municipality. Therefore, the said contention of Mr. Paresh Upadhyay cannot be accepted.

11. The contention of Mr. Paresh Upadhyay is that whatever the form adopted by the respondent Nagarpalika wherein reasonable opportunity was given to the petitioner and there is no straight jacket inquiry or formula and therefore, the method is proper. The said contention is also not accepted by this Court on the reason that the Apex Court has an occasion to consider the scope of inquiry and what is the procedure required to be followed by the department while holding the departmental inquiry.

12. In case of MEENGLAS TEA STATE V. THE WORKMEN, reported in AIR 1963 SC 1719, wherein it is held as under:

> "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross examination as he desires. Then he must be given a chance to rebut the evidence led against him . This is the barest requirement of an enquiry of this character this requirement must be substantially fulfilled before the result of the enquiry can be accepted."

Even in case of S.E. & STAMPING WORKS LTD. WORKMEN reported in AIR 1963 SC 1914, the Apex Court has observed as under :

> "An enquiry cannot be said to have been properly held unless, [i] the employee proceeded against has been informed clearly of the charges levelled against him, [ii] the witnesses are examined ordinarily in the presence of the employee in respect of the charges, [iii] the employee is given a fair opportunity to cross examine witnesses, [iv] he is given a fair opportunity to examine witnesses including himself in his

defence if he so wishes on any relevant matter, and [v] the enquiry officer records his findings with reasons for the same in his report."

In the case of U.P. WAREHOUSING CORPN. V. VIJAY NARAYAN reported in AIR 1980 SC 840, also the Court has held as under :

"The rules of natural justice in the circumstances of the case, required that the respondent should be given a reasonable opportunity to deny his guilt, to defend himself and to establish his innocence which means and includes an opportunity to cross examine the witnesses relied upon by the appellant Corporation and an opportunity to lead evidence in defence of the charge as also a shows cause notice for the proposed punishment."

Even this Court also, having considered all three decisions of the Apex Court referred to above, in case of G.S.R.T.C v. C.G.RASADIYA reported in 1993 [1] GLR 442. The observations made by the Division Bench of this Court are reproduced as under :

"14. In view of the aforesaid decisions, it would be difficult to uphold the contention raised by the learned advocate for the petitioner that in these cases the petitioner was not required to hold an elaborate inquiry for the misconduct of the respondent - Conductors. In both the petitions the Conductors' names are removed from the waiting list on the alleged ground of misappropriation of bus ticket fare as it is alleged that at the time of checking the buses on the relevant dates the Conductors had not issued the tickets after recovering fare and on such other grounds. In both the cases the Conductors have denied the allegations made against them. Inspite of this, the petitioner has not held any further inquiry. As both the Conductors have denied the allegations made against them, further inquiry ought to have been held and the department ought to have adduced evidence in support of the charges, and the delinquents ought to have been permitted to put relevant questions by way of cross examination if they desire. They also ought to have been given further chance to lead evidence in support of their case. In our view, this would be the

barest requirement of holding an inquiry in this type of grave misconduct. In the present cases Bus Conductors are not removed on account of unsuitability. If they are removed without casting any stigma, then in that case further inquiry is not necessary. In this view of the matter, it cannot be said that the order passed by the Labour Court calls for any interference."

Thus, the Division Bench of this Court has come to the conclusion that when the allegation has been made against the petitioner is denied by him then, further inquiry ought to have been held and the department ought to have adduced evidence in support of the charges, and the delinquents ought to have been permitted to put relevant questions by way of cross examination if they desire. They also ought to have been given further chance to lead evidence in support of their case. Therefore, according to the view of the Division Bench, this would be the minimum requirement of holding an inquiry in this type of grave misconduct.

13. In light of these observations of the Apex Court and the Division Bench of this Court, the form or method which has been adopted by the respondent Nagarpalika that cannot be considered as a proper inquiry in accordance with the principles of natural justice. Whatever the allegations made against the petitioner are based on documents may be considered but when the employee has denied the charge and filed the reply denying the charge and explaining defence then it is a burden upon the employer to prove the misconduct against the petitioner by leading proper evidence in departmental inquiry which give right to the employee to cross examine such witness. This is the proper method of reasonable opportunity given to the employee merely relying upon the document as if the document is proved without examining the anyone as if the documents are correct it amounts to denying the reasonable opportunity to the petitioner to cross examine such persons who has to prove the document. In the facts of this case, on 28.7.1999 the inquiry officer has called the petitioner personally saying that whether he wants to say something over and above the written submission which is also not enough in accordance with the principles of natural justice because calling the petitioner in presence of inquiry officer have some purpose. After calling the petitioner personally it was the duty of the inquiry officer to ask certain questions in respect of the evidence which has been taken into account against the petitioner by the inquiry officer and to call the explanation otherwise merely saying that he wants to add

anything is not enough and that method is contrary to the principles of natural justice. Therefore, according to my opinion, when I perused the entire inquiry report wherein no one was examined on behalf of the respondent Nagarpalika for proving the documents which is relied by the respondent Nagarpalika for proving the charge against the petitioner and therefore in absence of that evidence the allegation which has been found to be proved while considering the reply against the petitioner is not proper procedure adopted by the inquiry officer and it is contrary to the principle of natural justice. Therefore, in whatever manner the inquiry has been conducted is not in accordance with the principles of natural justice and therefore that inquiry is vitiated. It is also necessary to note that while calling the explanation at the stage of passing the punishment order the decision of the punishment of dismissal has been taken only on the ground that the reply submitted by the petitioner is not satisfactory and rational which resulted in the highest punishment of dismissal. This was the observation of the administrator in the dismissal order. Therefore, the contention which has been raised by Mr. Paresh Upadhyay that may not be a straight jacket formula of inquiry but atleast a substance must have to be considered by the Court while deciding this question in reality the reasonable opportunity of hearing has been given to the employee or not after perusing the record , according to my opinion no reasonable opportunity of hearing in a proper perspective has been given to the petitioner by the respondents. Therefore, the whole inquiry is vitiated and ultimately outcome of the inquiry is punishment order dated 25.10.1999 is also required to be quashed and set aside.

14. This aspect has been examined by this Court in Special Civil Application No. 9753 of 1999 by order dated 23.9.2003. Against the very respondent Nagarpalika similar type of inquiry was held. It is necessary to note that in that case learned advocate Mr. Vaidya who had appeared for Nagarpalika had accepted that the inquiry is not proper which was conducted in the similar form as conducted in the facts of this case. Therefore difference is that Mr. Vaidya had admitted that the inquiry is bad. Here in the present case Mr. Paresh Upadhyay has not admitted that the inquiry is bad that is how this Court has examined in detail the question raised by Mr. Paresh Upadhyay but result is the same in the present case also.

15. Now the question is if the dismissal order is set aside only on the ground that departmental inquiry is

vitiated, held to be contrary to the principles of natural justice. Then what would be the subsequent stage. According to my opinion the suggestion which has been given by Mr. Gandhi relying upon the earlier decision in Special Civil Application No. 9753 of 1999 dated 23.9.2003 is reasonable and proper suggestion that dismissal order required to be set aside and at the time when dismissal order was passed, petitioner was under suspension then instead of reinstatement petitioner must remain under suspension and within some reasonable time respondent Nagarpalika may be directed to hold denovo proper inquiry in accordance with principle of natural justice and the principle decided by the Apex Court and this Court as referred above within some reasonable time which will meet the ends of justice between the parties.

16. Therefore, in the result, the dismissal order passed by the respondent Nagarpalika dated 25.10.1999 is hereby quashed and set aside while holding that the departmental inquiry is vitiated. It is directed to the respondent Nagarpalika to hold de novo inquiry in respect to the chargesheet which was already served to the petitioner in accordance with the principles of natural justice as decided by the Apex Court as referred to in the body of the judgement by this Court within a period of six months from the date of receiving the copy of this order. Meanwhile the petitioner shall have to remain under suspension from 25.10.1999 till the denovo inquiry is completed by the respondent. It is, therefore, directed to the respondent Nagarpalika to pay suspension allowance to the petitioner w.e.f. 25.10.1999 according to the service rules of respondent Nagarpalika till 30.9.2003 within a period of one week from today and thereafter they should have to regularly pay suspension allowance till completion of departmental inquiry by the respondent Nagarpalika. However, a liberty has been given to the respondent Nagarpalika for payment of suspension allowance if there is some financial crisis with the respondent Nagarpalika then it is open for the respondent Nagarpalika to pay Rs.15000.00 to the petitioner on or before 21.10.2003 which can be adjusted by the respondent Nagarpalika against the suspension allowance for which the petitioner is entitled as per this order. However, it is also made clear that if respondent Nagarpalika require the service of the petitioner to be utilized in the interest of Nagarpalika, it is open for the Nagarpalika to do so in the interest of justice. Rule is made absolute accordingly with no order as to costs.

17. As the main petition is disposed of, no order is

required to be passed in Civil Application No. 2437 of 2002. Hence the said Civil Application is also disposed of with no order as to costs.

(H.K.Rathod,J)

Jayanti*